

UNITED STATES COURT OF APPEALS March 16, 2011

FOR THE TENTH CIRCUIT Elisabeth A. Shumaker
Clerk of Court

In re:

DERRICK EUGENE KIRTMAN,

No. 11-5019

Movant.

ORDER

Before **KELLY, O'BRIEN**, and **GORSUCH**, Circuit Judges.

After a jury found Derrick Eugene Kirtman guilty of federal drug violations, he unsuccessfully challenged his convictions by filing a 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence and a Fed. R. Civ. P. 60(b) motion to reopen the judgment of conviction. *See United States v. Kirtman*, 310 F. App'x 278, 281 (10th Cir. 2009) (instructing district court to dismiss the Rule 60(b) motion for lack of jurisdiction because it asserted unauthorized, successive § 2255 claims); *United States v. Kirtman*, 33 F. App'x 401, 402-03 (10th Cir. 2002) (denying a certificate of appealability for the § 2255 motion). He now seeks authorization to file a second or successive § 2255 motion. *See* 28 U.S.C. §§ 2255(h), 2244(b). Having reviewed the motion, the response filed by the United States, and Mr. Kirtman's reply, we deny authorization.

Under § 2255(h), to proceed with a second or successive § 2255 motion, the movant must show “newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense,” § 2255(h)(1), or “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” § 2255(h)(2). Mr. Kirtman relies solely on the “new evidence” test of § 2255(h)(1). He asserts that two Tulsa, Oklahoma, police officers who testified at his trial are among the several Tulsa officers who were recently indicted for crimes including conspiracy to suborn perjury, conspiracy to deprive persons of their civil rights, and conspiracy to commit witness tampering. He alleges that the officers “routinely used perjury and subornation of perjury to obtain convictions of other defendants in criminal jury trials, and did so in this case.” Mot. at 4.

As the United States points out, the trial testimony of the two indicted officers concerned co-conspirators, not Mr. Kirtman. And twelve other Tulsa officers, against whom no allegations of any wrongdoing have been made, also testified at the trial. In any event, Mr. Kirtman has offered no evidence to support his allegations of perjury and witness tampering in connection with his prosecution. Thus, his assertions of improper conduct amount to nothing more than speculation.

Mr. Kirtman has failed to make a prima facie showing “by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense,” as required by § 2255(h)(1). Accordingly, the motion for authorization is DENIED and this matter is terminated. This denial of authorization is not appealable and “shall not be the subject of a petition for rehearing or for a writ of certiorari.” 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court,

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a long horizontal flourish.

ELISABETH A. SHUMAKER, Clerk